No. 12446

IN THE

United States Court of Appeal

FOR THE NINTH CIRCUIT

H. W. SMITH, d/b/a A-1 PHOTO SERVICE,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF.

GIBSON, DUNN & CRUTCHER,
By J. STUART NEARY,
634 South Spring Street, Los Angeles 14,
Attorneys for Petitioner.

WILLIAM F. SPALDING,
Of Counsel.

FILED

JUN 22 1950

PAUL P. O'BRIEN,

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

Statement of jurisdiction 1

Statement of the case 2

Statement of error alleged 5

Argument 7

I.

The Board and this court has jurisdiction since the business of the petitioner was an engagement in commerce and the unfair labor practices have an affect upon commerce 8

II.

Under the Act the Board has no authority to review the General Counsel's decision to issue or not to issue a complaint 9

III.

The legislative history of the Act clearly demonstrates that Congress intended a complete separation of function and authority between the General Counsel and the Board and that the institution of complaints by the General Counsel was a final invocation of jurisdiction so far as concerns the Board if jurisdiction in fact exists 17

IV.

The Board, under the Act and in the light of principles applicable to quasi-judicial agencies, does not possess its claimed discretion to exercise or not exercise its jurisdiction as it sees fit 31

A. Section 10 of the Act does not grant discretion to the Board to decide if it will exercise its jurisdiction. On the contrary, Section 10 places a mandatory obligation on the Board to exercise its jurisdiction once it is invoked by the issuance of a complaint 31

PAGE

B. Congress intended to exercise its regulatory power over unfair labor practices to the fullest extent of its ability. The Board may not, therefore, decline to exercise such power when jurisdiction is invoked.................. 35

V.

Subsequent legislative history of the Labor Management Relations Act of 1947 fully indicates that Congress intended the General Counsel to act independent of the Board and without any type of review by the Board.................................. 50

Conclusion 54

INDEX TO APPENDIX

PAGE

Excerpts from Labor Management Relations Act of 1947 1

Section 4 of H. R. 3020 as reported by the House Committee on Education and Labor and as passed by the House of Representatives, 80th Congress, 1st Session, establishing the Office of Administrator of the National Labor Relations Act 11

Section 3 of H. R. 3020 in the form in which it passed the Senate, 80th Congress, 1st Session, providing for the organization of the National Labor Relations Board and deleting the establishment of the Office of the Administrator as contained in H. R. 3020 as previously passed the House 13

Excerpts from Volume 96, Congressional Record, 81st Congress, 2nd Session, relating to the submission by the President to the Congress of certain plans for reorganization of administrative agencies, among them Plan No. 12 for the reorganization of the National Labor Relations Board 15

Reorganization Plan No. 12 of 1950 (H. Doc. No. 516, 81st Congress, 2nd Session) 20

Excerpts from Senate Majority Report No. 1516, 81st Congress, 2nd Session of Senate Executive Expenditures Committee on Senate Resolution 248, a resolution to disapprove the President's Proposed Reorganization Plan No. 12 22

Excerpts from Minority Senate Report No. 1516, 81st Congress, 2nd Session of Senate Executive Expenditures Committee on Senate Resolution 248, a resolution to disapprove the President's Proposed Reorganization Plan No. 12 31

TABLE OF AUTHORITIES CITED

Cases

PAGE

Brooke v. Moore, 60 Ariz. 551, 142 P. 2d 211 48

Bryan v. Union Oil Co. of California, 155 F. 2d 625 .... 12, 13

Cohens v. Virginia, 6 Wheat. 264 44

Commonwealth v. Frost, 295 Ky. 137, 172 S. W. 2d 905 .... 47, 48

Dupont v. Mills, 9 Harr. 42, 196 Atl. 168, 119 A. L. R. 174 49

Federal Trade Commission v. Bunte Bros., 312 U. S. 349, 85 L. Ed. 881 .... 37, 50

First Nat. Bank v. School Dist., 173 Minn. 383, 217 N. W. 366 49

General Drivers, etc. Union v. N. L. R. B., 179 F. 2d 492 .... 11, 12

Great Northern R. Co. v. United States, 315 U. S. 262, 86 L. Ed. 836 51

Herzog v. Parsons, 25 L. R. R. M. 2413, 17 Lab. Cases, par. 65,610 .... 11, 12

Hotel Casey Co. v. Ross, 343 Pa. 573, 23 A. 2d 737 48

I. C. C. v. Humboldt S. S. Co., 224 U. S. 474, 56 L. Ed. 849 45

International Brotherhood of Electrical Workers, Local 501 v. N. L. R. B., 181 F. 2d 34 .... 8, 38

Jacobsen v. N. L. R. B., 120 F. 2d 96 .... 40, 42, 45

Laidlaw v. Abraham, 43 Fed. 297 .... 13, 14, 16

Lincoln Nat. Life Ins. Co. v. Fischer, Commissioner of Insurance, 235 Ia. 506, 17 N. W. 2d 273 48

Lincourt v. N. L. R. B., 170 F. 2d 306 .... 11, 12

Louisville Cement Co. v. I. C. C., 246 U. S. 638, 62 L. Ed. 914 45

M and M Wood W. Co. v. Plywood & Veneer W. L. U. No. 102, 23 Fed. Supp. 11 .... 42, 43

N. L. R. B. v. Cowell Portland C. Co., 108 F. 2d 198 .... 8, 36, 37

N. L. R. B. v. Fainblatt, 306 U. S. 601, 83 L. Ed. 1014 .... 8, 36

N. L. R. B. v. White Swan Co., 313 U. S. 23, 85 L. Ed. 1165 37

New York State Society, etc. v. Educational Dept., 262 App. Div. 602, 31 N. Y. S. 2d 305 48

PAGE

Novak v. Novak, 74 N. D. 572, 24 N. W. 2d 20 49

Pearce v. North Dakota Workmen's Comp. Bureau, 67 N. D. 512, 274 N. W. 587 49

People v. Common Council, 140 N. Y. 300, 35 N. E. 485 49

People v. Sisson, 222 N. Y. 387, 118 N. E. 789 48

Polish National Alliance v. N. L. R. B., 322 U. S. 643, 88 L. Ed. 1509 .... 8, 37, 39

Posey v. Board of Education, 199 N. C. 306, 154 S. E. 393, 70 A. L. R. 1306 48

Santa Cruz Fruit Packing Co. v. N. L. R. B., 303 U. S. 453, 82 L. Ed. 954 .... 8, 38

Sioux Tribe of Indians v. United States, 316 U. S. 317, 86 L. Ed. 1501 51

Supervisors v. United States, 4 Wall. (U. S.) 435, 18 L. Ed. 419 43

United States v. Tod, 1 F. 2d 246 .... 15, 16

United States v. Watkins, 170 F. 2d 1009 15

United States, Ex parte, 287 U. S. 241, 77 L. Ed. 283 45

United States ex rel. CG. W. R. Co., v. I. C. C., 294 U. S. 50, 79 L. Ed. 752 45

Village of Bridgeport v. Public Service Commission, 125 W. Va. 342, 24 S. E. 2d 285 .... 45, 47

Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 L. Ed. 382 44

MISCELLANEOUS

93 Congressional Record, p. 6540 24

93 Congressional Record, p. 6599 22

93 Congressional Record, p. 6600 22

93 Congressional Record, p. 6612 23

93 Congressional Record, p. 6655 24

93 Congressional Record, p. 6661 25

93 Congressional Record, p. 6672 25

PAGE

93 Congressional Record, p. 7001 23
93 Congressional Record, p. 7502 26
96 Congressional Record, p. 3754 52
96 Congressional Record, p. 4641 52
96 Congressional Record, p. 5632 52
96 Congressional Record, p. 6967 53
House Document No. 334 (80th Cong., 1st Sess.) 26
House Report No. 1902 (76th Cong., 1st Sess., p. 89) 27
House Report No. 1902, Part 2 (76th Cong., 1st Sess., p. 15) 27
House Report No. 1902, Part 2 (76th Cong., 1st Sess., p. 19) 27
House Report No. 3020 .... 17, 18, 20, 26, 27
House Report No. 3020, Sec. 4 .... 17, 18, 26
House Report No. 9195 (Smith Bill, 76th Cong., 3rd Sess.) 26
House Report No. 9195 (Smith Bill, Sec. 3(c), 76th Cong.) 26
House Report No. 245 (80th Cong., 1st Sess., p. 6) 19
House Report No. 245 (80th Cong., 1st Sess., p. 26) 19
House Report No. 510 (80th Cong., 1st Sess., p. 37) 21
House Report No. 245 (80th Cong., 1st Sess., p. 40) 19
House Report No. 245 (80th Cong., 1st Sess., p. 74) 20
House Report No. 510 (80th Cong., 1st Sess., p. 37) 53
Senate Report No. 105 (80th Cong., 1st Sess., p. 9) 20

STATUTES

National Labor Relations Act, Sec. 2(6), (7) 2, 39
National Labor Relations Act, Sec. 3(d) .. 4, 5, 6, 7, 9, 10, 12, 16, 28, 32, 34, 38, 55, 56
National Labor Relations Act, Sec. 8(b)(4)(D) 11
National Labor Relations Act, Sec. 9 .... 34, 35
National Labor Relations Act, Sec. 9(c) 35, 39
National Labor Relations Act, Sec. 9(c)(1) 34
National Labor Relations Act, Sec. 10 .... 31, 32, 34, 35, 49

PAGE

National Labor Relations Act, Sec. 10(a)....................32, 39

National Labor Relations Act, Sec. 10(b)....................32, 34

National Labor Relations Act, Sec. 10(c)....................6, 33, 34, 39

National Labor Relations Act, Sec. 10(f).................... 1

National Labor Relations Act, Sec. 10(k).................... 11

United States Code Annotated, Title 29, Sec. 152(6), (7)....................2, 35, 39

United States Code Annotated, Title 29, Sec. 160(f).................... 1

United States Code Annotated, Title 46, Sec. 3.................... 12

TEXTBOOKS

42 American Jurisprudence, Sec. 69.................... 47

28 North Carolina Law Review, p. 1.................... 30

20 Opinions of Attorneys General of the United States, p. 367.. 16

No. 12446

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. W. Smith, d/b/a A-1 Photo Service,

Petitioner,

vs.

National Labor Relations Board,

Respondent.

PETITIONER'S OPENING BRIEF.

Statement of Jurisdiction.

This is a proceeding to review an order of the National Labor Relations Board, being instituted by a person aggrieved by such order. The court acquires jurisdiction by virtue of Section 10 (f) (29 U. S. C. A. Sec. 160 (f)) of the National Labor Relations Act as amended which provides that any person aggrieved by a final order of the Board granting or denying the relief sought may obtain a review of the order in any Court of Appeals in the Circuit where tne unfair labor practice was alleged to have occurred or wherein such person resides or transacts business.

The Petitioner resides and transacts business in the City of San Pedro, California [R. 52] within the jurisdiction of this court. The unfair labor practices hereafter described also occurred in the City of San Pedro, California.

As will also appear hereafter, the Petitioner is engaged in a business which is in commerce or which affects commerce within the meaning of the National Labor Relations Act (hereinafter referred to as the "Act"), Section 2 (6) and (7) (29 U. S. C. A. Sec. 152 (6) and (7)) (App. p. 4).

Statement of the Case.

The Petitioner, H. W. Smith, does business as A-1 Photo Service in San Pedro, California [R. 52]. On April 5, 1948, Petitioner filed with the Regional Office of the National Labor Relations Board (hereinafter referred to as the "Board"), Twenty-First Region, an amended charge alleging that the Retail Clerks International Association, A. F. of L., Local 905, Haskell Tidwell, Secretary-Treasurer, and Albert E. Morgan, Business Agent, had and were engaging in unfair labor practices affecting commerce. This amended charge appears at R. 78-79, being General Counsel's Exhibit No. 1. However, in printing the charge the printer for the most part printed only the standard form, omitting the inserted substance with respect to the charges.

The General Counsel of the Board, through the Regional Director, issued a complaint on April 7, 1948, against the Respondents [R. 80 *et seq.*] which complaint alleged the unfair labor practices contained in the charge referred to.

Pursuant to notice a hearing was held before a Trial Examiner [R. 4], who thereafter issued his Intermediate Report, findings, and recommendations [R. 2 *et seq.*]. This Intermediate Report found certain facts with respect to the business of the Petitioner and concluded from the facts that the Petitioner is engaged in commerce within

the meaning of the Act [R. 7-11]. With respect to the unfair labor practices the Trial Examiner found that the Respondents were guilty of certain of the unfair labor practices alleged but recommended dismissal of the complaint against the Respondents with respect to certain other alleged unfair labor practices since these other allegations were found to be, in the Trial Examiner's opinion, without merit in fact [R. 11-44]. The nature and circumstances of the unfair labor practices charged are not important to the consideration of this matter.

The Board thereafter considered the record and on May 13, 1949, issued its decision and order, the subject of this petition, dismissing the complaint against the Respondents in its entirety on the ground that, though the business of Petitioner constituted engagement in commerce within the meaning of the Act, such business was essentially local in nature, having too insubstantial an effect upon commerce to warrant the Board exercising its jurisdiction. The Board in no way considered the unfair labor practices or passed any judgment thereon. The rationale of the Board in dismissing the complaint though it had jurisdiction to act, and though it gave no consideration to the truth of the unfair labor practice charges, was that a business of the nature of Petitioner's was such that it "would not effectuate the purposes of the Act" for the Board to exercise its jurisdiction and the Board claimed to have discretionary authority to dismiss complaints in such cases [R. 51-60].

Thereafter, the General Counsel filed a motion for reconsideration of the Board's order [R. 60 *et seq.*] urging that the Board had no such discretion and that the institution of a complaint by the General Counsel could not

be dismissed by the Board upon the grounds asserted if there was jurisdiction in fact. The Board denied this motion [R. 77]. Thereafter, on January 3, 1950, Petitioner instituted this proceeding to review the order of the Board.

The facts with respect to Petitioner's engagement in commerce were not contested [R. 53]. These facts are set forth in the Board's opinion [R. 52-53] and the Intermediate Report [R. 7-11]. It there appears that Petitioner purchased approximately 44% of his total purchases directly in interstate commerce. The opinion of the Board itself discloses that the Board agreed that it had jurisdiction in fact and dismissed the complaint only because it did not see fit to exercise its admitted jurisdiction. The Board has filed in this court an Answer to the Petitioner's Statement of Points in which Answer the Board states that the only issue in the case is:

> "Whether the Board, having found that petitioner's operations affect commerce within the meaning of the Act, nevertheless had discriminatory [*sic*] authority to dismiss the unfair labor practice complaint upon finding further that, since such operations were essentially local and interruption thereof by a labor dispute would have only a remote and insubstantial effect upon commerce, the assertion of jurisdiction would not effectuate the purposes of the Act."

In this case, therefore, we have no question as to whether the Board had jurisdiction in fact since it admits it did. The only question relates to whether despite the existence of such jurisdiction it may decline to exercise it by dismissing the complaint issued by the General Counsel pursuant to the final authority vested in him by Section 3 (d) of the Act (App. p. 6).

Statement of Error Alleged.

The Amendments of 1947 to the National Labor Relations Act established the office of the General Counsel of the Board. Certain duties were assigned exclusively to the General Counsel so as to make him, at least in part, an agency independent, though within, the Board. One of these exclusive duties related to the issuance of complaints and the prosecution of cases before the Board, such duties to be performed independently of the Board and without review by the Board. This is set forth in Section 3 (d) as follows:

> "'(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.'"

In this particular case the General Counsel saw fit to issue a complaint. In making such a decision the General Counsel necessarily finds:

(1) That there is probable cause to believe the existence of unfair labor practices.

(2) There is probable cause to believe there is jurisdiction to correct these practices.

(3) The nature of these unfair labor practices and the effect upon commerce is sufficient to warrant the exercise of the Board's corrective jurisdiction.

Of course, when the matter comes to the Board it is free to find against the General Counsel on either (1) or (2), that is, that there were no unfair labor practices in fact or that there is no jurisdiction in fact. Section 10 (c) of the Act, Appendix p. 9, expressly so states. However, it is submitted that in view of Section 3 (d) the Board has no discretion or authority to re-examine the General Counsel's decision with respect to the third factor and to overrule the General Counsel on that factor and thereby dismiss the complaint.

We do not contend that the Board has no discretion. Once the Board has taken its jurisdiction and determined that unfair labor practices have been committed it has a broad discretion to take action designed to effectuate the policy of the Act. Such discretion, however, relates to the positive exercise of its corrective authority. It does not relate nor pertain to the question of whether the Board will or will not exercise such corrective authority.

In the instant case the Board has not exercised its discretion to effectuate the policies of the Act by eradicating the effect of unfair labor practices. It has decided, on the contrary, that it will not exercise its hearing function to determine if unfair labor practices were committed in a business admittedly subject to the Board's jurisdiction.

The error, therefore, alleged in this proceeding is that the Board erred in not determining whether unfair labor practices were committed and in assuming that it had authority to dismiss the complaint where jurisdiction in fact exists for policy reasons and despite the General Counsel's action in instituting the proceeding.

ARGUMENT.

It is contended herein that on the face of Section 3 (d) of the Act the decision of the General Counsel that there is sufficient policy cause to warrant the issuance of a complaint and his subsequent institution of such a complaint cannot be reviewed by the Board. The Board in deciding in this case that it did not see fit to exercise its jurisdiction because the business affected was of a local nature is a decision squarely in conflict with that of the General Counsel and constitutes, if valid, a reversal of his decision. While the Board insists that it is not reviewing the General Counsel's institution of the complaint, it is submitted that this constitutes a review and reversal in fact, whatever it may be called by name. This final and unreviewable authority of the General Counsel is supported by the Act read as a whole wherein it is evidenced that Congress intended to exercise its power over commerce to the fullest extent, whether it be great or small, national or local. It is also contended that the Board as a judicial agency does not have discretion to decide whether it will or will not act if its existing jurisdiction is properly invoked, although it does have a great deal of discretion in the manner in which it will act in the exercise of its jurisdiction. It is contended that such is the intent of the Act as appears on its face and as will be shown by the legislative history of the Act and the Congressional Record.

I.

The Board and This Court Has Jurisdiction Since the Business of the Petitioner Was an Engagement in Commerce and the Unfair Labor Practices Have an Affect Upon Commerce.

The Board agrees that it has jurisdiction because the business of Petitioner constitutes engagement in interstate commerce, or has an affect upon interstate commerce, or both. It is abundantly established by the authorities that the Board did in fact have jurisdiction in this case since Congress intended in the National Labor Relations Act to exercise its constitutional power to regulate businesses in interstate commerce and affecting interstate commerce to its fullest extent.

N. L. R. B. v. Fainblatt, 306 U. S. 601, 606, 83 L. Ed. 1014 (1939);

N. L. R. B. v. Cowell Portland C. Co., 108 F. 2d 198 (C. A. 9, 1939);

Polish National Alliance v. N. L. R. B., 322 U. S. 643, 88 L. Ed. 1509 (1944);

International Brotherhood of Electrical Workers, Local 501 v. N. L. R. B., 181 F. 2d 34, 36 (C. A. 2, 1950);

Santa Cruz Fruit Packing Co. v. N. L. R. B., 303 U. S. 453, 464, 82 L. Ed. 954, 959 (1938).

II.

Under the Act the Board Has No Authority to Review the General Counsel's Decision to Issue or Not to Issue a Complaint.

Section 3(d) (App. p. 6) provides that the General Counsel shall have *"final authority,* on behalf of the Board" to issue and prosecute complaints. Of course, if it appears that the General Counsel was wrong in his belief that the Board had jurisdiction, then the Board may, and in fact must, dismiss the matter. However, if the authority of the General Counsel is a "final authority" with respect to the issuance and prosecution of complaints, then, where jurisdiction exists, Section 3 (d) must mean that the decision of the General Counsel that the case is worthy of prosecution must be accepted as conclusive. If the Board has the authority to find that the complaint should not have been issued because the business is local, and thereupon has the authority to dismiss the complaint, then the General Counsel does not have "final authority" to issue complaints which function, of necessity, requires a decision by the General Counsel as to whether or not the nature of the business and the unfair labor practices are such as to justify exertion of jurisdiction. This "final authority" of the General Counsel on behalf of the Board precludes any review of the exercise of that authority by the Board itself; for otherwise the authority would not be final.

The Board does not disagree with the above statement. In fact, the Board admits that it cannot review the refusal

of the General Counsel to issue a complaint *and also admits that it cannot review the decision of the General Counsel to issue a complaint.* In its decision in this case the Board stated [R. 55]:

> "Furthermore, the legislative history shows that Congress intended the General Counsel to exercise his authority *to issue or refrain from issuing a complaint independently of any direction, control, or review by the Board."* (Emphasis added.)

While the above admission would seem to end the matter, the Board attempts to escape such a result by claiming not to be reviewing the decision of the General Counsel but rather to be exercising its judicial power under the Act [R. 55], supporting this contention by the claim of a general discretionary authority to dismiss complaints [R. 58-59] and a general discretionary authority to act or not act as its discretion dictates.

There is no provision in the Act to warrant the Board's claim to such discretion. With the provisions of Section 3 (d) being written as they are, the authority of the General Counsel with respect to issuing and prosecuting complaints is *final.* Whatever the Board may call its action in disagreeing with the General Counsel's decision of policy such action cannot be consistent with a final decision or final authority of the General Counsel.

There have been instances in which an individual attempted to obtain review in the courts of the General Counsel's refusal to issue complaints. It has been consistently held in these cases that the decision of the Gen-

eral Counsel is not reviewable. It was so held in *Lincourt v. N. L. R. B.*, 170 F. 2d 306 (C. A. 1, 1948) where it is stated:

> "It is to be noted that the Labor Management Relations Act of 1947 introduced into § 3 of the National Labor Relations Act a new subsection (d), 29 U. S. C. A. § 153(d), which took away from the Board the administrative power to issue complaints under § 10. As the Act now reads, the General Counsel of the Board 'shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10.' Such administrative determinations by the General Counsel are not denominated 'orders' in the Act, and the Act makes no provision for their review. That the Board itself no longer has power to make such determinations only serves to emphasize, what is otherwise abundantly clear, that there has in this case been no 'final order of the Board' within the meaning of § 10(f)." *Lincourt v. N. L. R. B.*, 170 F. 2d 306, 307 (C. A. 1, 1948.)

To similar effect see:

> *General Drivers, etc. Union v. N. L. R. B.*, 179 F. 2d 492 (C. A. 10, 1950).

In *Herzog v. Parsons*, 25 L. R. R. M. 2413, 17 L. Cases, par. 65,610 (C. A. D. C. Feb. 20, 1950) the Court of Appeals for the District of Columbia had an issue which came close to that involved in the instant case. (This decision, while given February 20, 1950, cannot be found reported in the Advance Sheets of the Unofficial Reports.) That case involved the question of whether under Section 10 (k) of the Act, which deals with unfair labor practices under Section 8 (b) (4) (D), the Board

must forthwith hold a hearing or whether it may first investigate to see if there is a *prima facie* case. The court held it was without jurisdiction and stated in closing, citing Section 3 (d) for the statement:

> "It is not necessary for us to decide at this time to what extent this decision precludes judicial review of these administrative determinations by the General Counsel of the Board, though we do agree with the action of the Board in the instant case in refusing to review the determination of that officer *because by virtue of the provisions of the Act final authority, at least as far as the Board is concerned, is vested in him.*" (Emphasis added.) *Herzog v. Parsons,* 25 L. R. R. M., 2413, 2418-2419, 17 L. Cases par. 65,610 (C. A. D. C. Feb. 20, 1950).

The word "final" is one with varying implications. In some instances it is only a "final" matter which is reviewable at all; in other instances the term "final" indicates that no review is available. In this case the term "final authority, on behalf of the Board" means that so far as concerns the Board the authority is final and therefore without review within the Board. Whether the authority and decision is reviewable in the courts and outside of the Board is a question not involved although the *Lincourt* case, *supra,* and the *General Drivers, etc. Union* case, *supra,* hold that the "final authority" of the General Counsel is nowhere reviewable.

In *Bryan v. Union Oil Co. of California,* 155 F. 2d 625 (C. A. 9, 1946), this court had a similar problem with respect to the term "final" as it occurred in an Act (46 U. S. C. A. Sec. 3) which makes final the decision of the Commissioner of Navigation on the question of the

propriety of a tonnage tax. This court held that in view of the term "final" no further review of the decision of the Commissioner of Navigation was available within the administrative body. This court stated:

> "Three months later, in the Laidlaw case, the Circuit Court for the District of Oregon decided that the Act of July 5, 1884, 46 U. S. C. A. § 3, which makes final the decision of the Commissioner of Navigation on the question of refunding a tonnage tax erroneously imposed, does not take away the right of action from the person who paid the tax, but the purpose and effect of the act is that *such decision shall be 'final' in the department*, so that the Secretary of the Treasury shall not be burdened with the duty of reviewing it. The Court deliberated and carefully considered the 'first blush' impression that the aforesaid Act repealed the taxpayer's right of redress in the courts, but concluded 'on reflection, I am satisfied that the word "final" is used in this connection with reference to the department, of which the commissioner is generally a subordinate part.' In fact, the Court there intimated that if the Act were intended by Congress to deprive a taxpayer of all redress in the courts it would be contrary to the Fifth Amendment and unconstitutional." (Emphasis added.) *Bryan v. Union Oil Co. of California*, 155 F. 2d 625, 626-627 (C. A. 9, 1946).

The case of *Laidlaw v. Abraham*, 43 Fed. 297 (Cir. Ct., Dist. of Oregon 1890), which was approved by this court in the above case was a suit to recover a tonnage tax in which the defendant collector contended that in view of the term "final" occurring in the Act the court had no jurisdiction to review the decision of the commissioner. The court stated:

"This act is entitled 'An act to constitute a bureau of navigation in the treasury department.' The commissioner created by it is charged, 'under the direction of the secretary of the treasury' with many duties concerning 'the commercial, marine, and merchant seamen of the United States;' and, by section 3 thereof, 'with the supervision of the laws relating to the admeasurement of vessels and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, *his decision shall be final.'*

* * * * * * * *

"But, on reflection, I am satisfied that the word 'final' is used in this connection with reference to the department, of which the commissioner is generally a subordinate part.

"In my judgment, the purpose of the provision is to relieve the head of the department from the labor of reviewing the action of the commissioner in these matters, to side track into the bureau of navigation the business of rating vessels for tonnage duties, and deciding questions arising on appeals from the exaction of the same by collectors.

"The appeal is still taken to the secretary of the treasury, as provided in section 2931, but goes to the commissioner for decision, whose action is 'final' in the department, *as it would not be but for this provision of the statute."* (Emphasis added.) *Laidlaw v. Abraham,* 43 Fed. 297, 299 (C. C. D. Ore. 1890).

A similar problem of division of authority within an administrative agency was involved in *United States v.*

Tod, 1 F. 2d 246 (C. A. 2, 1924). The Immigration Act provides appeals to the Secretary of Labor from the board of special inquiry in certain cases, but in other cases states that the decision of the Board is final. The court held the latter precludes any review in those cases holding with respect to the term "final":

> "In the instant case the board of special inquiry, which is the board that first acted, excluded the relator as we have seen; the exclusion being based upon the medical certificate. The word 'final,' as defined in Bouvier's Law Dictionary, is: 'Last; conclusive; pertaining to the end.' And in Burrill's Law Dictionary it is said to be 'that which terminates a matter or proceeding.' In 13 Am. & Eng. Encyc. of Law, p. 19, it is said: 'Final means conclusive; from which there is no appeal.' When a legislative act creates a tribunal and provides that its decision shall be 'final' on a given matter, the courts have held that the legislative intent was that its decision was not subject to review or appeal, but was conclusive of the question decided. [Citing many cases.]" (P. 252.)
>
> *   *   *   *   *   *   *   *
>
> "As the Immigration Act declares that the decision of the board of special inquiry shall be 'final,' we are at a loss to see that either the Secretary of Labor, the Commissioner General of Immigration, the Commissioner of Immigration, or the immigration inspector in charge, who are all alike bound mandatorily by the 'final' decision of the board of special inquiry, have any power to reopen the 'final' decision." (P. 259.) *United States v. Tod,* 1 F. 2d 246, 252, 259 (C. A. 2, 1924).

This case was reversed in 267 U. S. 571, 69 L. Ed. 793 without opinion upon the confession of error by the Solicitor General. In *United States v. Watkins,* 170 F. 2d 1009

(C. A. 2, 1948) the same court followed the *Tod* decision treating it as conclusive and stating that the reversal without opinion did not render it ineffective.

See also *20 Opinions of Attorneys General of the United States,* p. 367, advising the President of the United States pursuant to the *Laidlaw* case, *supra,* that he had no authority to review the decision of the Commissioner of Navigation, stating:

> "It can not well be denied that this determination is fairly within the enactment quoted, which makes the decision of the Commissioner final on all questions of interpretation growing out of the execution of the laws relating to the collection of the tonnage tax, and to the refund thereof. Of course it is not intended to advise that the Commissioner of Navigation, if convinced that he has made an erroneous ruling, may not make a different ruling. But it is my opinion that the construction of the law declared in due course by that executive officer designated by Congress to interpret the same ought to be regarded, and that, as this case now stands, the Executive is not clothed with authority by reversing that decision to adjust this claim for past exactions." 20 Opinions of Attorneys General of the United States, pp. 367, 370-371.

These cases give affirmance to the meaning which the term "final authority" bears on its face. In view of the Board's admission that it cannot review the General Counsel's issuance of a complaint, the only question is whether the action of the Board in the instant case constitutes a review. Whatever name may be given the action it is apparent that it is in fact a review as indicated by the above cases dealing with Section 3 (d) of this Act and analogous provisions in other Acts.

III.

The Legislative History of the Act Clearly Demonstrates That Congress Intended a Complete Separation of Function and Authority Between the General Counsel and the Board and That the Institution of Complaints by the General Counsel Was a Final Invocation of Jurisdiction so far as Concerns the Board if Jurisdiction in Fact Exists.

The legislative history, Committee Reports, and Congressional Debates with reference to the Act fully demonstrates that the plain implications of the term "final authority" were fully intended by Congress.

Under the Wagner Act the Board was both prosecutor and judge, and this situation led to the most violent dissatisfaction with such an administrative system. The Congressional Record is replete with evidence that Congress intended, with the Amendments of 1947, to sever these functions, to relegate the Board to the position of judging facts in a judicial manner, having nothing to do with the investigation and action which precede the hearing, including the decision incident to issuance of a complaint. This purpose was carried out by Congress in establishing the office of the General Counsel within, but nevertheless at least in part independent, of the Board. In order to completely remove the Board from the field of prosecution, it was necessary to give the General Counsel complete freedom and independence from the Board and to that end Congress vested in him "final authority" to perform those duties which the Act placed upon him. The House version of the Amendments enacted in 1947 was contained in H. R. 3020. Section 4 of this Bill (App. pp. 11-12) set up a completely independent agency called the Admin-

istrator of the National Labor Relations Act, and assigned him the function of investigating charges, issuing complaints, enforcing Board orders and conducting elections. While the Administrator was established as an agency completely apart from the Board, it will be noted that the House Bill made no express statement with respect to the finality of the Administrator's action.

The Senate version of the Amendments originated with S. 1126, which Bill had no provision with respect to an Administrator or General Counsel. The Senate passed its own version of H. R. 3020, which is reproduced herein in Appendix, page 13. Section 3 of this Bill established the Board much as it was under the old Act and did not have any of the provisions in it with respect to the Administrator as previously contained in the House version of H. R. 3020, Section 4.

Thereafter, a Conference Bill was reported out which was passed by both Houses without further amendment and which contained a provision establishing the office of the General Counsel. This final Bill is set forth in the Appendix; see Section 3, Appendix, pages 5-6. Thereafter, the President vetoed this Bill but Congress passed it into law over his veto.

The Committee Reports of these various Bills and the debates are illuminating on the issue in this proceeding. The House Committee on Labor and Education which reported out H. R. 3020 with the provision contained in it with respect to the Administrator clearly indicated that

the Bill sought to separate the prosecuting and judicial functions and to make the Administrator completely independent of any type of review by the Board. The Committee stated:

> "Unlike the old Board, it will not act as prosecutor, judge, and jury. *Its sole function will be to decide cases.* A new and independent officer, the Administrator of the new Act, will investigate cases and present evidence to the new Board and the new Board must decide the cases . . ." (Emphasis supplied.) H. Rep. No. 245, 80th Cong., 1st Sess., p. 6.
>
> * * * * * * * *
>
> "Briefly, the Administrator takes over the investigating and prosecuting functions of the present Board, . . . The Administrator is to be an independent agency of the Government and is to act free of influence and control by the Board and its staff.
>
> * * * * * * * *
>
> "In unfair labor practice cases, the Administrator will determine whether or not an alleged unfair labor practice is, indeed, such a practice under the act, and if so, he will proceed as members of the Board's field staff have proceeded in the past." H. Rep. No. 245, 80th Cong., 1st Sess., p. 26.
>
> * * * * * * * *
>
> "If the Administrator has reasonable cause to believe that the charge is true he issues a complaint and has it served on the person complained of. *It is only when the facts the complainant alleges do not constitute an unfair practice, or when the complainant clearly cannot prove his claim, that the Administrator has any discretion not to issue a complaint.*" H. Rep. No. 245, 80th Cong., 1st Sess., p. 40.

Even the Minority members of the House Committee realized that the function of the Board under H. R. 3020 would be simply to decide cases.

> "The functions of the Board are to be limited solely to the decision of cases and the Administrator is to assume all of the investigatory and prosecuting functions of the present National Labor Relations Board."
>
> H. Rep. No. 245, 80th Cong., 1st Sess., p. 74.

While S. 1126 did not provide for a separation of functions, the Senate nevertheless intended the Board to achieve at least a measure of separation of functions. This Bill in Section 4 expressly provided that the section maintained by the Board to assist it in reviewing the record of cases submitted to it was to be abolished. The Senate Report stated:

> "Since it is the belief of the committee that *Congress intended the Board to function like a court,* this bill eliminates the Review Section." (Emphasis supplied.) Senate Rep. No. 105, 80th Cong., 1st Sess., p. 9.

The Bill reported out of the Conference Committee is the present statutory enactment. The House Conference Report stated with respect to the Conference Bill and its provision for the General Counsel's office:

> "The conference agreement does not make provisions for an independent agency to exercise the investigating and prosecuting functions under the act, but does provide that there shall be a General Counsel of the Board, who is to be appointed by the President, by and with the advice and consent of the Senate, for a term of 4 years. The General Counsel is to have general supervision and direction of all

attorneys employed by the Board (excluding the trial examiners and the legal assistants to the individual members of the Board), and of all the officers and employees in the Board's regional offices, *and is to have the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints* of unfair labor practices, and in respect of other duties as the Board may prescribe or as may be provided by law. By this provision responsibility for what takes place in the Board's regional offices is centralized in one individual, who is ultimately responsible to the President and Congress." (Emphasis added.) H. Rep. No. 510, 80th Cong., 1st Sess., p. 37.

Senator Taft filed a summary of the provisions of the Conference Bill in the Senate, discussing the reorganization of the National Labor Relations Board as accomplished by that Bill. This summary stated in part:

"One of the major problems with which the conferees were faced was the reconciliation of the provisions of the House bill and the Senate amendments with respect to the reorganization of the National Labor Relations Board. Under the Senate amendment the present Board members were to be retained in office but four additional members were to be added, thus increasing the Board to seven. The House bill abolished the present Board, created a new Board of three members and limited the duties of the members to quasi-judicial functions. The House bill also created a new independent agency under an administrator to be appointed by the President (subject to Senate confirmation) to perform the investigating and prosecuting functions.

"The conference agreement (section 3(a)) retains the existing Board and increases its membership to five rather than seven. *Further, it recognizes the principle of separating judicial and prosecuting functions without going to the extent of establishing a completely independent agency. It accomplishes separation of functions within the framework of the existing agency by establishing a new statutory office, that is, a general counsel of the Board to be appointed by the President, by and with the advice and consent of the Senate, for a term of 4 years. . . . He is also to have the final authority to act in the name of, but independently of any direction, control, or review by the Board* in respect to the investigation of charges and the issuance of complaints of unfair labor practices and in the prosecution of such complaints before the Board." (Emphasis added.) 93 Cong. Rec. 6599, June 5, 1947.

And again:

"The combination of the provisions dealing with the authority of the general counsel, the abolition of the review division, and the limitation of duties of the trial examiners effectively limits the Board members to the performance of quasi-judicial functions." 93 Cong. Rec. 6600, June 5, 1947.

Senator Taft also made a supplemental analysis of the Conference Bill in which he stated with respect to the General Counsel:

"Section 3(d): In order to make an effective separation between the judicial and prosecuting functions of the Board and yet avoid the cumbersome device of establishing a new independent agency in the executive branch of the Government, the conferees cre-

> ated the office of general counsel of the Board, . . . We invested in this office final authority to issue complaints, prosecute them before the Board, and supervise the field investigating and trial personnel." 93 Cong. Rec. 7001, June 12, 1947.

The following statement by Senator Morse made in debate discloses the understanding of the opponents to the Conference Bill:

> "I believe that the provisions of the amended bill, insofar as they create a statutory office of General Counsel, who is to be appointed by the President for a fixed term of years, and confer upon him final authority in respect to investigation and prosecution of charges and issuance of complaints, in effect establish a separation of functions which does not differ in any substantial measure from the kind of separation which we opposed when it appeared in Senate bill 360, the Ball Bill . . ." 93 Cong. Rec. 6612, June 5, 1947.

In the debate in the House of Representatives on the Conference Bill the following took place between Representative Owens, a member of the House Labor Committee, and Chairman Hartley of the House Labor Committee:

> "Mr. Owens. I believe that one of the most important portions of this bill is the division of powers; that is, the division of the functions, the investigation, the prosecution, the complaints, and the judicial end. The gentleman mentioned that the general counsel would be absolutely independent.

* * * * * * * *

"MR. OWENS. It is my understanding that the conference is saying to the House at this time that those different sections, where they mention the Board, means that it is the general counsel who shall have the power to proceed with the investigation, with the complaint, and shall have complete power over the attorneys who are prosecuting; that the Board shall not control him or *have the right of review in any way.* Is that correct?

"MR. HARTLEY. The gentleman's opinion is absolutely correct. . . ." (Emphasis supplied.) 93 Cong. Rec. 6540, June 4, 1947.

The Congressional debates fully disclose that Congress realized the extent to which they vested final authority in a single person, without the right of any tribunal to review or overrule his decision. The opponents of the Bill at great length stated their reluctance to see this "czar" and "dictator" being injected into this field of regulation. The following statements along these lines were made by Senator Murray:

"The effect of this provision, is to set up a labor czar within the National Labor Relations Board. . . . One person will determine when complaints shall issue in all cases . . ., how cases shall be tried, which cases shall be enforced. . . . No real power is vested in the Board in order that their collective common sense may be brought to bear on these serious problems. The whole purpose of the administrative process, that uniform policies may prevail at all levels of work, is thereby frustrated. . . . Coordination in policy is essential in order that rules and regulations, prosecutions, and decisions maintain some consistency." 93 Cong. Rec. 6655, June 6, 1947.

* * * * * * * *

"The effect of the proposed change in the status of the Board's General Counsel is to place enormous power in the hands of a single individual, making him virtually a 'labor czar'. This power would include the right to decide what unfair labor practice cases shall come before the Board and the courts for decision. Through this power, the General Counsel, to a considerable degree, would be able to control the policy for the enforcement of the Act." 93 Cong. Rec. 6661, June 6, 1947.

Senator Pepper informed the members of the Senate of the authority of the General Counsel as follows:

"*The General Counsel is to determine when a complaint shall be acted upon by the Board.* In other words, one man is made the arbiter of every case that comes before the attention of the Board. *The Board has no authority to decide whether a case should be brought, or whether a complaint should be acted upon.* That exclusive power is given to one lawyer, provided for by the bill agreed to in the conference of the House and the Senate." (Emphasis added.) 93 Cong. Rec. 6672, June 6, 1947.

The President stated in his veto message with reference to the office of the General Counsel:

"It would invite conflict between the National Labor Relations Board and its General Counsel, since the General Counsel would decide, without any right of appeal by employers and employees, whether charges were to be heard by the Board, and whether orders of the Board were to be referred to the Court for enforcement. By virtue of this unlimited authority, a single administrative official might usurp

> the Board's responsibility for establishing policy under the Act." H. Doc. No. 334, 80th Cong., 1st Sess.; 93 Cong. Rec. 7502, June 20, 1947.

This understanding of the President is consistent with that of the Congress itself as indicated by the above statements.

The enacted Amendments of 1947 were not the first attempt by Congress to establish an office similar to that of the General Counsel. In the 76th Congress, 3rd Session, there was introduced the so-called Smith Bill, H. R. 9195, which passed the House of Representatives but was not reported out of the Senate Committee on Labor. The provisions of the Smith Bill relating to the separating of functions were, with minor exceptions, exactly the same as H. R. 3020 which passed the House of the 80th Congress. Section 4 of H. R. 3020 was contained in Section 3(c) of the Smith Bill, H. R. 9195, 76th Congress. The Intermediate Report of the Committee which handled the Smith Bill stated:

> "Consequently, the committee recommends most emphatically the adoption of its amendment to section 3(a) of the act, which creates an entirely separate board *entrusted solely with the judicial function of this agency.* There is proposed in section 3(d) an Administrator (following the pattern of some of the more recently created administrative bodies) whose function will be to carry on the investigative and prosecuting functions entirely separate and distinct from the judicial function of the Board proper.
>
> "The Administrator, of course, will have to be a competent and trustworthy public official, appointed by the President and confirmed by the Senate, *for in his discretion lies the determination of which cases*

are worthy of prosecution. Objection has been made to this provision on the ground that it will lie within his discretion as to whether complaints shall be preferred for violation of the act. This is true. It is equally true that that discretion now rests with the Board. The committee has no reason to anticipate that the Administrator, whoever is appointed, will not honestly perform his functions . . ." (Emphasis added.) H. Rep. 1902, 76th Cong., 1st Sess., p. 89.

The Minority Report of this Committee stated:

"Under the amendments proposed by the majority, the functions of the Board would be limited to holding hearings, making findings, and issuing orders (sec. 3(a); sec. 10)." H. Rep. 1902, Part 2, 76th Cong., 1st Sess., p. 15.

* * * * * * * *

"The amendments recommended by the majority seek to establish what amounts to a labor court." H. Rep. 1902, Part 2, 76th Cong., 1st Sess., p. 19.

It is true that the office of the General Counsel established in the Conference Bill did not have the independence of the Administrator as set forth in H. R. 3020. However, in the sense in which we are interested in the independence of the General Counsel the Conference Committee gave the General Counsel a degree of finality in his authority which the House had not given the completely independent Administrator. This is evidenced by the fact that H. R. 3020 contained no statement with respect to the finality of the Administrator's action while the Conference Bill gave the General Counsel "final authority" within his field even though in other respects the General Counsel was an integral part of the Board. The Confer-

ence Bill likewise gave the General Counsel greater authority than the Administrator in that the Conference Bill did not require the General Counsel to issue complaints in all cases (as did the House Bill) but simply left this matter to his discretion. As indicated by the various reports and debates, Congress gave this final authority to the General Counsel with full realization of what it was doing and with the open intent of achieving the full implications of Section 3(d).

Included in the authority of the General Counsel, as Congress realized, was the uncontrolled discretion to determine the type and choice of cases which would go before the Board for decision; and this exercise of discretion was, as Section 3(d) states, to be final on behalf of the Board; and as Section 3(d) itself implies, and as the legislative history proves, this was all to be without any type of review by the Board itself. If it is true that Congress gave the General Counsel that discretionary authority, without review by the Board, can it be said that the General Counsel possesses such final authority if the Board can dismiss cases on the ground that they do not think the case is of the type they care to hear or in which they choose to exercise their jurisdiction? If the Board may do that, then the General Counsel does not have final authority to determine the type of cases to be brought before the Board. If the Board may do that the General Counsel does not have final authority to issue complaints because the Board is saying no more than that the complaint before it should not have been instituted, and since it should not have been instituted, they will dismiss it

summarily without any consideration of the merits of the case, and though they possess jurisdiction to act. It is submitted that if the Board may do this, not only does the General Counsel not have final authority but the Board is not performing its sole function of deciding cases. Rather, it is refusing to decide cases and choosing the type of cases which it cares to decide. Clearly Congress intended to take from the Board this discretion which admittedly it had had prior to the Amendments of 1947.

This construction of the Act achieves an efficiency of administration and a centralization of authority which is desirable and reasonable. Where possible, it is, of course, assumed that Congress intended to enact provisions which would achieve such results. It is apparent that if Congress was to separate the prosecuting and the judicial function of the Board, it would have to do so in a manner which gave the prosecuting authority complete finality in his decisions. If functions are to be separated, the Board must not tell the General Counsel of the cases it desires to hear. If the Board is not to do that, the decision of the General Counsel must be made unhampered of any authority of the Board. If so, then, when the General Counsel has instituted a complaint, that is an end to the matter. The only function remaining is the decision of the case including, of course, the decision of whether there is jurisdiction in fact and whether or not unfair labor practices were committed; but to add to that function the authority to decide apart from the merits of the case that the matter should not, on policy grounds, have

been instituted in the first place is simply to reduce the General Counsel to the position of an automaton, not having any authority, and guided only by a method of trial and error in his presentation of cases. It would mean that after the effort in presenting the case has been expended, after all the evidence has been taken, after the transcript has been prepared and submitted to the Board, after the parties have journeyed to Washington to argue the case before the Board, then, after all of that they are told by the Board that it should never have been started at all, that the Board has decided not to do that which the General Counsel has already done. Congress could not have intended to create such a frustrated authority in the General Counsel. An agency so established could lead to nothing but confusion and useless expenditure of Government and private funds. Such a situation actually exists today in view of the Board's claim of authority to dismiss complaints where it does not see fit to exercise its jurisdiction (see App. p. 30). Congress could not have intended the unreasonable situation existing in the present application of the Board's position. (See: 28 N. C. Law Rev. 1.) There is only one way in which such a situation could have been avoided by Congress and that is to establish in the General Counsel an authority to choose the cases which the Board would decide with the intent that such choice when made by the General Counsel would be final so far as concerns the Board. It is submitted that the Act itself, and especially in the light of its history, fully discloses that Congress intended to do just that.

IV.

The Board, Under the Act and in the Light of Principles Applicable to Quasi-Judicial Agencies, Does Not Possess Its Claimed Discretion to Exercise or Not Exercise Its Jurisdiction as It Sees Fit.

A. Section 10 of the Act Does Not Grant Discretion to the Board to Decide if It Will Exercise Its Jurisdiction. On the Contrary, Section 10 Places a Mandatory Obligation on the Board to Exercise Its Jurisdiction Once It Is Invoked by the Issuance of a Complaint.

In its opinion the Board states [R. 53-54]:

> "Under Section 10 of the Act, as amended the Board is 'empowered' to prevent any person from engaging in any unfair labor practice 'affecting commerce,' but it is not directed to exercise its preventive powers in all such cases. From this, we believe it reasonable to infer, in the absence of any convincing evidence to the contrary, that Congress intended the Board to continue to have discretionary authority to decline to exercise these powers in appropriate cases, as it had under the Wagner Act. The Board can now exercise this discretionary authority only by dismissing a complaint. We have therefore dismissed complaints—as we have declined to proceed with representation cases—when, in our opinion, the assertion of jurisdiction would not effectuate the policies of the Act."

This the Board states despite its admission [R. 55] that it does not have authority to review the decision of the General Counsel to issue or not to issue a complaint. Section 10 of the Act, which apparently is the basis of the

Board's claim to this discretion, is reproduced at Appendix pages 7-10. It is submitted that the Board does not have the discretion which it asserts. To the extent that Section 10 grants a discretion to exercise jurisdiction, the Board's argument ignores the fact that Section 3(d) grants that discretion to the General Counsel. Also of relevance is the fact, as will be hereinafter established, that in enacting this Act Congress intended to exercise its power to regulate commerce to the fullest extent of its constitutional ability, including even those incidents which, when considered in isolation, are merely local. Such an intent means that once existing jurisdiction is invoked the quasi-judicial power of the Board must be exercised. After the invocation of jurisdiction, by the institution of a complaint, discretion to act is at an end and the function of the Board to decide cases has become mandatory. We do not mean that Section 10 does not grant discretion to the Board. Section 10 does, in fact, grant a very large discretion to the Board; but the discretion granted in Section 10, except to the extent to which it is granted to the General Counsel, is not a discretion to act or not act but simply is a discretion as to the manner in which it will act to eradicate the effects of unfair labor practices.

Section 10(a) provides that the Board is empowered "as hereinafter provided" to prevent unfair labor practices. The phrase "as hereinafter provided" cannot be ignored. Section 10(b) provides that the Board "shall have power" to issue a complaint. This reference to the Board obviously means the General Counsel, an integral part of the Board, as shown by Section 3(d). The Board has argued in its decision that the terms "empowered" and "shall have power" to prevent unfair labor practices and to issue complaints convey a permissive rather than

mandatory authority. As will appear hereinafter those terms may well be mandatory despite their permissive nature. However, assuming for the moment that the terms are permissive, it is impossible to understand how the discretion conveyed by such permissive language can be considered to be vested in the Board rather than in the General Counsel.

Section 10(c) is the grant to the Board of its corrective power. That section states, and it speaks here with reference solely to the Board proper, that if the Board be of the opinion that unfair labor practices have been committed, "then the Board *shall* state its findings of fact and *shall* issue . . ." an order requiring the person guilty to cease and desist, and to take such *"affirmative* action" as will effectuate the policies of this Act. Section 10(c) also goes on to provide that if the Board shall not be of the opinion that unfair labor practices have been committed, then the Board *"shall"* state its findings and *"shall"* dismiss the complaint. Except for the discretion granted to issue an order requiring "affirmative" action by the party guilty of unfair labor practices, this section surely conveys no discretion whatsoever to the Board. It states that if it believes that unfair labor practices are committed, it "shall" issue a cease and desist order; if it is of the opinion that unfair labor practices were not committed, it "shall" dismiss the complaint. The section does not state that it may dismiss the complaint if it sees fit. It only states that after considering the evidence it "shall" issue an order or dismiss depending upon its findings with respect to the unfair labor practices charged.

In summary, therefore, Section 10 provides:

(1) Section 10(a) provides the Board is empowered "as hereinafter provided" to prevent unfair labor practices.

(2) Under Section 10(b) "as hereinafter provided" is found to mean that the General Counsel (in the light of Section 3(d)) has discretion and final authority to issue a complaint charging the unfair labor practices.

(3) Under Section 10(c) "as hereinafter provided" is found to mean that the Board *must* consider the evidence with respect to unfair labor practices and it shall make its decision with respect to such unfair labor practices, issuing a cease and desist order or dismissing the complaint depending upon its findings with respect to the unfair labor practices.

Even in the matter of determination of representatives and elections, which admittedly is under the exclusive authority of the Board, the Board does not have its claimed discretion to decline its jurisdiction. Section 9 of the Act states the Board's function in cases involving representation. Section 9(c)(1) states that whenever a petition is filed seeking a determination of representatives "the Board *shall* investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall* provide for an appropriate hearing upon due notice. If the Board finds upon the record of such hearing that such a question of representation exists, it *shall* direct an election by secret ballots and *shall* certify the results thereof." Surely this provision conveys no discretion to act upon the Board. It is mandatory that the Board determine a matter of

representation if it has reasonable cause to believe that such a question exists, affecting commerce. The term "affecting commerce" is identical with the term "jurisdiction" (see Section 2(7) of the Act, App. p. 4). If the Board has jurisdiction, then the question affects commerce and if it affects commerce, then the Board has jurisdiction. In short, if it has jurisdiction it must decide the question of representation presented to it. This is the plain meaning of Section 9 of the Act. This becomes obvious in the light of the language of the original Wagner Act wherein Section 9(c) provided that whenever a question of representation arises "the Board *may* investigate such controversy and certify to the parties, * * *" the representative selected. It is submitted that Section 10, dealing with the prevention of unfair labor practices, is on its face equally mandatory so far as concerns the Board proper. The Board surely cannot claim as great a discretion in exercising its jurisdiction in unfair labor practice matters as it could have claimed in representation matters.

B. Congress Intended to Exercise Its Regulatory Power Over Unfair Labor Practices to the Fullest Extent of Its Ability. The Board May Not, Therefore, Decline to Exercise Such Power When Jurisdiction Is Invoked.

The Board intimates in its opinion that its claimed discretion is one which is inherent in an administrative agency exercising judicial functions. The source of this claimed discretion, if it is not Section 10, is not disclosed. The Board simply states that as an administrative agency it has, by definition, such discretion. This involves the question of whether the functions of the Board are per-

missive or mandatory, which question, of course, depends upon the intent of Congress. This question cannot be divorced from the questions of the functions of the General Counsel. Apparently Congress did intend to convey a discretion to act and to the extent it did so it placed that discretion in the General Counsel. Once he has seen fit to invoke the Board's jurisdiction, the Board has no discretion itself to decline to exercise it. This is evidenced not only by the "final authority" of the General Counsel but also by the patent fact that Congress intended the Board to exercise its power over unfair labor practices to the fullest extent possible under the Commerce Clause, and even over merely local businesses. This was authoritatively decided in *N. L. R. B. v. Fainblatt,* 306 U. S. 601, 606, 83 L. Ed. 1014 (1939). It was recognized and applied by this court in *N. L. R. B. v. Cowell Portland C. Co.,* 108 F. 2d 198 (C. A. 9, 1939), where this Court stated:

> "The National Labor Relations Act 'on its face * * * evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts. * * * Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim de minimis.' National Labor Relations Board v. Fainblatt, supra, 306 U. S. 607, 59 S. Ct. 672, 83 L. Ed. 1014.
>
> "The quantity of cement shipped out of state is not de minimis merely because it is but a small per-

centage of respondent's total sales. Otherwise, we would have the anomaly of one plant under federal regulation because exporting its entire products of 14,000 barrels while alongside it another competing plant under state regulation because, though shipping the same amount of 14,000 barrels, they constituted, say, but 4 per cent of its product. Congress could not have intended that it would subject laboring men or employers to such a confusing and, in business competition, such a destructive anomaly. Nor is the quantity of a particular product shipped out of state de minimis merely because it is small in proportion to the total interstate commerce in that product from all the states or from the employer's state."

N. L. R. B. v. Cowell Portland C. Co., 108 F. 2d 198, 201 (C. A. 9, 1939).

In *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 85 L. Ed. 881 (1941), the court cites the National Labor Relations Act as a typical regulatory Act in which Congress explicitly conveyed its purpose to regulate activities which in isolation are merely local.

Also, in *N. L. R. B. v. White Swan Co.*, 313 U. S. 23, 85 L. Ed. 1165 (1941), the court held that the term "local business" is meaningful for purposes of jurisdiction under the Act only in the light of the findings of the Board disclosing the type of jurisdiction which it claims; that is, whether the Board found commerce itself or jurisdiction based on an affect upon commerce.

In *Polish Nat. Alliance v. N. L. R. B.*, 322 U. S. 643, 647-8, 88 L. Ed. 1509, 1514-15 (1944), the Supreme Court states that in the National Labor Relations Act Congress has undertaken to regulate all conduct which under the Commerce Clause is capable of Federal regula-

tion; that Congress has evidenced its intent to even regulate local businesses; that the jurisdiction of the Board and the applicability of the Act is not judged by the affect upon commerce of the practices engaged in in each particular case, but rather is judged by the totality of all such conduct in all cases; in other words, by such practices in general rather than those in a specific case. The Supreme Court also stated that the Board is to determine in each case if there is an affect upon commerce, doing so when judged in the light of the full reach of the power of Congress. While the latter statement is still true under the Amendments of 1947, the determination with respect to the affect upon commerce of each case is by Section 3(d) vested in the General Counsel rather than in the Board as under the Wagner Act.

Also see:

> *Santa Cruz Fruit Packing Co. v. N. L. R. B.,* 303 U. S. 453, 464, 82 L. Ed. 954, 959 (1938);
>
> *International Brotherhood of Electrical Workers, Local 501 v. N. L. R. B.,* 181 F. 2d 34, 36 (C. A. 2, 1950).

In the Amendments of 1947 Congress further evidenced its intent to extend its power to its fullest limits. The Preamble of the Labor Management Relations Act of 1947 (App. pp. 1-2) states the policy "to promote the *full* flow of commerce." The Preamble to the original Wagner Act (App. pp. 2-4) states the policy to eliminate the causes of certain "substantial obstructions to the free flow of commerce. * * *" This reference to "substantial obstructions" in this Preamble refers to labor disputes in general as being a substantial obstruction rather than re-

ferring only to those individual labor disputes which are substantial obstructions. See *Polish Natl. Alliance v. N. L. R. B., supra.*

The definitions of commerce and affecting commerce, Section 2 (6), 2 (7) (App. p. 4), measures the reach of the Board's jurisdiction. In Section 10 (a) Congress provided in the Amendments of 1947 for the cession of jurisdiction by the Board to State agencies even including mining, manufacturing and communications where predominantly "local" in character. By this treatment Congress had in mind the coverage of all businesses under the Act even those local in character. It apparently did not intend for any business capable of regulation to go unnoticed. It is easy to infer from this provision, in the light of Congress' intent to exercise its power in full, that the Board is to exercise its jurisdiction over local business except in the cases where it is able to cede such jurisdiction to State agencies. The mandatory provisions of Section 9 (c) relating to determination of representatives, and Section 10 (c) relating to the prevention of unfair labor practices, equally evidences Congress' intent that the Board exercise the power to the full extent that Congress has provided.

This intent of Congress is not consistent with the Board's claim of a discretion not to decide cases relating to businesses of a local nature. The only discretion in the matter in any way granted by the Act is lodged in the General Counsel. Once it has been invoked by him there is no provision anywhere in the Act for further discretion in such matter by the Board. In fact, any further existence of discretion would not be compatible with the evident intent of Congress.

The authorities are in agreement that when a legislative body has evidenced an intention to invoke its power to an extent similar to that which Congress has done in the National Labor Relations Act, and where such power is invoked in the public interest, as it is in the National Labor Relations Act, the agency vested with such power has no general grant of permissive authority as to whether or not it will exercise it though it may, and often does, have a general discretion in the manner of affirmative exercise.

In *Jacobsen v. N. L. R. B.,* 120 F. 2d 96 (C. A. 3, 1941), a decision was made which virtually rules the question in this case. There, after involved and prolonged proceedings of unfair labor practice charges against an employer, the Board dismissed the complaint because it could not determine from the record if it had jurisdiction. The decision of the Board stated:

> " 'We are of the opinion that the facts set forth in the record are not sufficiently developed to afford a basis for determining whether or not the operations of the respondent affect commerce, within the meaning of the Act. Under such circumstances we ordinarily would dismiss the complaint without prejudice. However, in view of the long period of time which has elapsed since the filing of the charges and the nature of the proceedings heretofore had, the Board, acting within the discretion granted it by Section 10 of the Act, does not deem it advisable to reopen the record upon this point. We shall, therefore, dismiss the complaint in its entirety.' " (Pp. 98-99.)

Thereafter, the petitioner's petition to reopen before the Board was denied, and a petition to review was filed in the Court of Appeal seeking to reverse the order of the

Board dismissing the complaint. The court remanded the matter to the Board clearly holding that since the jurisdiction of the Board was invoked, it must decide if it has jurisdiction and if it finds that it does have jurisdiction it must determine the unfair labor practice charges. It is apparent from the decision of the court that the Board's claim of discretion figured largely in the arguments before the court because the court stated:

> "We have dealt with the ramifications in this case in such detail because the questions presented are those both of jurisdiction and discretion." (P. 99.)

In holding that the Board must determine its jurisdiction and thereafter determine the question of unfair labor practices, the court stated:

> "The Board is the judge of the facts and if its findings are supported by substantial evidence we must accept them. It has made no finding upon the fundamental issue of commerce affected. The Board took inconsistent positions. It stated that the record did not afford a basis for determining whether the operations of Protective Motor Service Company affect commerce within the meaning of the act and then, in an exercise of discretion, refused to receive additional evidence upon this very pertinent issue. Aside from any question presented as to the right of the petitioners to adduce additional evidence, *the Board, having issued its complaint and proceeded to hearings, had the duty to decide in limine whether or not the operations of the Protective Motor Service Company affected commerce within the meaning of the act, and in our opinion it was error for the Board not to do this.*" (Emphasis added.) (Pp. 100-101.)

* * * * * * * *

"Accordingly a decree will be entered setting aside the order of the Board and remanding the cause with directions to reinstate the complaint, to allow the petitioners a reasonable opportunity to present the evidence referred to in their petitions, and to determine the issue of interstate commerce, *and if it be found that the operations of Protective Motor Service do affect commerce within the purview of the act, to determine whether or not that company has engaged in unfair labor practices and to issue an appropriate order in respect thereto.*" (Emphasis added.) (P. 101.)

It is true that the court in the *Jacobsen* case did not have the same question before it as is involved in this proceeding. It could not, of course, because at that time the General Counsel's office did not exist. However, the opinion, fairly construed, is a determination that when the jurisdiction of the Board is invoked the Board has the duty of first determining its jurisdiction in fact; secondly, if it has jurisdiction, to determine the unfair labor practice question; and thirdly, if it finds unfair labor practices have been committed, issue an appropriate order with respect to them.

In *M and M Wood W. Co. v. Plywood & Veneer W. L. U. No. 102,* 23 Fed. Supp. 11 (D. C. Ore. 1938), a temporary injunction was sought to enjoin a dispute between factions of a union. This injunction was denied, the court observing that a National Labor Relations Board complaint had been filed in the matter and stating:

"Although the Board was thus vested with all the power to intervene which it now possesses, no motion was made by it to construe the contract and relieve the people of the state from the insensate strife. The

power to settle controversy by administrative action *carries with it the responsibility to act.*" (Emphasis added.) *M and M Wood W. Co. v. Plywood & Veneer W. L. U. No. 102,* 23 Fed. Supp. 11, 19 (D. C. Ore. 1938).

Contrary to the Board's assertion of discretion as to whether it will or will not act, principles applicable to such an agency indicate that a permissive authority in it to act is not to be readily inferred. In fact, it is generally held that an agency vested with power to act in the public interest has the obligation of acting whenever its jurisdiction is invoked.

In *Supervisors v. United States,* 4 Wall. (U. S.) 435, 18 L. Ed. 419 (1866), it is stated:

"That act declares that 'the board of supervisors under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, *may, if deemed advisable,* levy a special tax, * * *'" (P. 445.)

* * * * * * * *

"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.

> "In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.'
>
> "The line which separates this class of cases from those which involve the exercise of a discretion, judicial in its nature, which courts cannot control, is too obvious to require remark. This case clearly does not fall within the latter category." (Pp. 446-447.)

This claim of discretion on the part of the Board is also inconsistent with the intent of Congress to give it only quasi-judicial functions in unfair labor practice cases. A judicial body does not have a discretion as to whether it will or will not exercise its jurisdiction. This has been declared many times with respect to various courts. The principle was originally recognized by Chief Justice Marshall in *Cohens v. Virginia,* 6 Wheat. 264, where it was stated:

> "We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given."

In *Willcox v. Consolidated Gas Co.,* 212 U. S. 19, 40, 53 L. Ed. 382, 394 (1909), it was held that:

> "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction * * * *That the case may be one of local interest only is entirely immaterial,* * * *" (Emphasis added.)

Also see *Ex parte United States,* 287 U. S. 241, 250, 77 L. Ed. 283, 287 (1932):

> "* * * the power to enforce does not inherently beget a discretion permanently to refuse to enforce, * * *"

In numerous cases an agency has neglected to exercise its jurisdiction upon the mistaken belief that it did not have jurisdiction. In such cases the courts have not been hesitant to issue a writ of mandamus against the agency requiring it to assume and exercise its jurisdiction at once.

> *I. C. C. v. Humboldt S. S. Co.,* 224 U. S. 474, 489, 56 L. Ed. 849 (1912);
>
> *Louisville Cement Co. v. I. C. C.,* 246 U. S. 638, 62 L. Ed. 914 (1918);
>
> *U. S. ex rel. CG. W. R. Co. v. I. C. C.,* 294 U. S. 50, 60, 61, 79 L. Ed. 752 (1935);
>
> *Jacobsen v. N. L. R. B.,* 120 F. 2d 96 (C. A. 3, 1941).

An interesting case for the question before the court is *Village of Bridgeport v. Public Service Commission,* 125 W. Va. 342, 24 S. E. 2d 285 (1943), which was a petition for mandamus to require defendants to dispose of a complaint filed with it by petitioner. This complaint sought to restore tolls on a bridge. It appeared that negotiations were under way for transfer of title to the bridge and defendant refused to act upon the complaint until such negotiations were completed, finding:

> " 'The Commission is of the opinion that a determination by it at this time of the issues presented, would serve no useful purpose, would be without any practical effect, and upon the delivery of said bridges

to the State Road Commission of West Virginia, would not be binding upon that body, and for the reasons herein stated the Commission declines to determine the issues presented until a final disposition has been made of the aforesaid pending transactions relating to the sale of said bridges.

" 'This proceeding is continued to a date hereafter to be fixed by the Commission.' " (P. 287.)

The court, after finding defendant had power to regulate the tolls, found its refusal to exercise such power unlawful.

"In discharging the functions required by the statute of its creation and subsequent related acts, the Public Service Commission is dealing with instrumentalities that certainly affect the public interest and welfare in many vital ways, and we believe it is quite apparent, even though the legislative purposes are not expressed in its enactment relating to the Commission's duties, that the expeditious and prompt exercise of its powers is a necessarily implied requirement. The Commission is an administrative body whose duties demand the exercise of quasi judicial functions. It has no arbitrary discretion, so that its powers are not to be exercised in a manner that is controlled by what, in its judgment, the expediency of the situation with which it is confronted requires.

"Considering the powers vested in the Public Service Commission in the dual aspect of an administrative body exercising quasi judicial powers, in our opinion, the exercise of neither class of powers can be properly delayed for reasons which do not arise in the matter under consideration, no matter how closely, in the opinion of the acting agency, they may be related thereto. Certainly this is true of an administrative body and we believe that this conclusion

is borne out by the provisions of the act creating the Commission, by the terms of which the Commission is definitely required to act within a prescribed period in certain matters. See Code, 24-2-4. *That being so of administrative bodies and also true of judicial bodies* (Ault v. O'Brien, Judge, 121 W. Va. 705, 6 S. E. 2d 228; French v. Bennett, Judge, 69 W. Va. 653, 72 S. E. 746; see also, Ex parte Loring, 94 U. S. 418, 24 L. Ed. 165, and Hudson v. Parker, 156 U. S. 277, 288, bottom, 15 S. Ct. 450, 39 L. Ed. 424), *we believe that it necessarily follows that the same rule applies to an administrative body exercising quasi judicial functions* (Wiley and Booker v. County Court, 111 W. Va. 646, 163 S. E. 441), *and that it is not the right of such a body to suspend unduly, by awaiting the alternative occurrence of a future event, the exercise of its proper function.* While this court will not suggest the course of conduct to be pursued by a different division of the state government, nevertheless, where its refusal to act is admittedly based upon expediency and is, in fact, an arbitrary disregard of what otherwise would be its ordinary duty, plainly we are required to act." (Emphasis added.) (Pp. 287-288.) *Village of Bridgeport v. Public Service Commission,* 125 W. Va. 342, 24 S. E. 2d 285 (1943).

In *Commonwealth v. Frost,* 295 Ky. 137, 172 S. W. 2d 905 (1943), the court quotes approvingly as follows from 42 Am. Jur., Public Administrative Law, Section 69:

> " 'Administrative officers may lawfully be vested with a large measure of discretion in exercising their powers, but this discretion must be exercised in accordance with established principles of justice and not arbitrarily or capriciously, fraudulently, or without factual basis. Discretion of administrative officers does not extend to permitting them to ignore or trans-

gress limitations upon their power. Where power is conferred upon an administrative board and its exercise is made mandatory, there is no discretion as to whether, in good faith and in accordance with the legislative will, the power shall be exercised, although there may be discretion as to the manner of its exercise. When the only right of an individual or the public which the law gives is that which a designated officer deems best, the honest decision of that officer is the measure of the right.' " (P. 909.) *Commonwealth v. Frost,* 295 Ky. 137, 172 S. W. 2d 905 (1943).

It would be impossible to consider all of the cases holding that an administrative agency has no discretion as to whether it will act, and that language vesting power in an agency which is permissive in form is to be construed as mandatory where the powers exercised relate to the public interest. The following are only a number of such cases:

Hotel Casey Co. v. Ross, 343 Pa. 573, 23 Atl. 2d 737 (1942) (Holding that the term "empowered", while generally considered permissive, is mandatory in such cases);

Posey v. Board of Education, 199 N. C. 306, 154 S. E. 393, 70 A. L. R. 1306 (1930);

New York State Society, Etc. v. Educational Dept., 262 App. Div. 602, 31 N. Y. S. 2d 305 (1941);

Lincoln Nat. Life Ins. Co. v. Fischer, Commissioner of Insurance, 235 Ia. 506, 17 N. W. 2d 273 (1945);

People v. Sisson, 222 N. Y. 387, 118 N. E. 789 (1918);

Brooke v. Moore, 60 Ariz. 551, 142 P. 2d 211 (1943);

Pearce v. North Dakota Workmen's Comp. Bureau, 67 N. D. 512, 274 N. W. 587 (1937);

Novak v. Novak, 74 N. D. 572, 24 N. W. 2d 20 (1946);

First Nat. Bank v. School Dist., 173 Minn. 383, 217 N. W. 366 (1928);

People v. Common Council, 140 N. Y. 300, 35 N. E. 485 (1893);

Dupont v. Mills, 9 Harr. 42, 196 Atl. 168, 119 A. L. R. 174 (Del. 1937).

It would seem, therefore, that the Board's claim to a discretion as to whether it will act, so far as it is based on Section 10 of the Act, is one which has no support from that section but, on the contrary, the section is actually mandatory in form so far as concerns the Board. So far as such claim of discretion is based upon general principles applicable to administrative agencies, it is clear from the above authorities that this claim is without support. In fact, it is established that, quite to the contrary, an administrative agency has no more discretion as to whether it will exercise its jurisdiction than does a court. The only distinguishing feature of an administrative agency is its usual possession of a large discretion in the manner in which it exercises its jurisdiction, a discretion not usual in the courts. The Board can no better justify its action upon a claim of discretion as to whether it will act than it could claim to have the right to review the General Counsel's issuance of a complaint, which right, of course, the Board expressly admits it does not have. The Board's dismissal of the complaint in the instant case then was erroneous, not only because it was in fact a review, but because there is no discretionary power otherwise on which to base such action.

V.

Subsequent Legislative History of the Labor Management Relations Act of 1947 Fully Indicates That Congress Intended the General Counsel to Act Independent of the Board and Without Any Type of Review by the Board.

In some instances the legislative history of an Act occurring subsequent to its enactment is as disclosing of the intent of Congress as the legislative history prior to its enactment. As will be discussed hereafter the subsequent history of this Act with reference to the General Counsel involves a Reorganization Plan by the President which would have returned the functions of the General Counsel to the control of the Board. This Plan was defeated by Congressional action. The ability of the court to consider events subsequent to the enactment of the statute is clear.

In *Federal Trade Commission v. Bunte Bros.,* 312 U. S. 349, 85 L. Ed. 881 (1941), the Federal Trade Commission contended it had power to regulate purely intrastate sales which have an affect on interstate sales. The court held it had no such power over local business as the statute gave authority over interstate sales only. The court points out that this conclusion is supported by the fact that the commission never previously claimed such authority and also:

> "This practical construction of the Act by those entrusted with its administration is reinforced by the Commission's unsuccessful attempt in 1935 to secure from Congress an express grant of authority over transactions 'affecting' commerce in addition to its control of practices in commerce. S. Rep. No. 46, 74th Cong. 1st Sess." *Federal Trade Commission v. Bunte Bros.,* 312 U. S. 349, 85 L. Ed. 881, 884 (1941).

In *Sioux Tribe of Indians v. United States,* 316 U. S. 317, 329-330, 86 L. Ed. 1501, 1509 (1942), it seems that five years after the statute was enacted the same Congressional Committee which previously reported the statute made a report as to its meaning. With respect to the construction of this statute the court held that this statement by the same committee was virtually conclusive on the court.

In *Great Northern R. Co. v. United States,* 315 U. S. 262, 277, 86 L. Ed. 836, 844 (1942), the court holds that subsequent legislation may be considered as an aid in interpreting prior statutes, citing several cases for the proposition.

On March 13, 1950, the President submitted to Congress various plans of reorganization for a number of administrative agencies. Among these was Plan No. 12 which would have abolished the office of the General Counsel and transferred certain of his functions to the Chairman of the Board and to the full Board. These plans were submitted pursuant to the Reorganization Act of 1949 and according to the provisions of that Act would have become law after sixty days if neither House of Congress within that time voted to disapprove the Plan.

The Presidential messages accompanying these plans, the plan itself, and the Senate Committee Report with respect to Plan No. 12 are reproduced in the Appendix, pages 15-31. It will be observed that the President states that Plan No. 12 seeks to restore unified responsibility (App. p. 16) in the National Labor Relations Board by abolishing the office of the General Counsel and transferring his functions to the Board and Chairman. The President also stated (App. pp. 17-18) that Reorganization

Plan No. 12 would terminate the present division and confusion of responsibility in the National Labor Relations Board by abolishing the office of the General Counsel.

Reorganization Plan No. 12 itself (App. pp. 20-21) apparently would have transferred the General Counsel's supervisory and administrative functions to the Chairman (Section 1) and would have transferred other functions of the General Counsel, among them the prosecuting function and the issuance of complaints, to the full Board (Section 3).

After submission of these plans to Congress, Senator Taft introduced Senate Resolution 248 to disapprove Reorganization Plan No. 12, which resolution was referred to the Committee on Expenditures in the Executive Department (96 Cong. Rec. 4641). In the House, Resolution No. 516 was also introduced for the purpose of disapproving Reorganization Plan No. 12, which was referred to the House Committee on Expenditures in the Executive Department (96 Cong. Rec. 3754).

The Senate Committee reported favorably on Senate Resolution 248 (96 Cong. Rec. 5632); that is, recommended that the Resolution disapproving Reorganization Plan No. 12 be passed. This Committee submitted a report, Senate Report No. 1516, excerpts from which are set out in the Appendix, pages 22-31. This report states that Plan No. 12 in seeking to abolish the General Counsel's office is contrary to the policy expressed by Congress in the 1947 Amendments. The Senate Committee states this intent of Congress by quoting from the Conference Report on the Labor Management Relations Act of 1947

(H. Rep. No. 510, 80th Congress, 1st Session, p. 37), to the effect that the General Counsel would have final authority in respect of the investigation of charges and issuance of complaints and in the prosecution of such complaints before the Board, and that such would be independent of any "direction, control, or review by, the Board . . ." (see App. p. 26). This report also discloses (App. pp. 27-28) that it was desired that the authority of the General Counsel to issue complaints be without any type of review by the Board. The fact that Congress intended that the Board act only as a judicial agency, having nothing whatsoever to do with the functions incident to the prosecution, is evidenced throughout the report. The Minority Report (App. p. 31), while advocating approval of the Presidential Reorganization Plan No. 12, admits that the General Counsel has "final unreviewable authority to issue unfair labor practice complaints" on behalf of the Board (App. p. 31).

After submission of this report the Senate voted to disapprove Reorganization Plan No. 12, thereby continuing the office of the General Counsel in effect (96 Cong. Rec. 6967). This action of Congress is further evidence of its intent that the office of the General Counsel be one essential to its statutory scheme of the separation of the powers and functions of the Board. Congress thereby reaffirmed that the General Counsel was desired by it to be completely independent and free of any control or influence of the Board in the performance of the functions delegated to him by Congress.

Conclusion.

In the Board's decision it is pointed out [R. 57] that the Supreme Court has held that the Board may withhold or dismiss its complaint if it should appear that the union presenting the charge has engaged in such a course of violence as to constitute an abuse of the Board's process. From this the Board contends that it may now dismiss a complaint for policy reasons, the policy being that it does not see fit to exercise its jurisdiction in local businesses. The Board also points out other instances [R. 59, footnote 10] in which it has dismissed "unfair labor practice allegations" for policy reasons.

It is not necessary to consider here whether the Board has discretion to dismiss a complaint for policy reasons in any of these cases cited by the Board in its decision. It will be observed that in all those cases the policy effectuated by the dismissal of the complaint was one directly connected with eradicating the results of unfair labor practices and affirmatively effectuating the policies of the Act. The policy of the Act, of course, is to remove the causes of interferences which are obstructions to commerce. Where it appears during the hearing that the parties have made an agreement settling a strike and unfair labor practice charges together, the Board may be entitled to hold that it effectuates the policy of the Act, the settlement of labor disputes, to encourage such settlement agreements by dismissing the complaint which would reopen the dispute previously settled. The Board also may be entitled to hold that though a respondent has been guilty of unfair labor practices, the conduct of the charging party is equally unlawful and such that to give any relief to him would actually fly in the face of the policy of the

Act rather than effectuating such policy. In such cases the Board may be able to make such findings as would entitle it to dismiss the complaint despite the existence of jurisdiction and even of unfair labor practices. In all of such cases it is apparent that the policy invoked by the Board in dismissing the complaint is one relating to the settlement of labor disputes, or one pointed to the end of eliminating arbitrary or unlawful action by the charging party. Those policies may be attributed to the Board's discretion to so frame its order as to effectuate the policies of the Act because such effectuation is in a positive, affirmative manner representing an exercise of the Board's jurisdiction toward the end of eliminating the causes of labor disputes and obstructions to commerce.

In the instant case the policy motivating the dismissal of the complaint was in no way related to removing causes of labor disputes or obstructions to commerce. The distinction then between the ability of the Board to dismiss a complaint for policy reasons in the cases considered above and in the instant case is apparent. The dismissal of a complaint upon the policy ground that the business is local has nothing whatsoever to do with effectuating the policy of the Act. It is a refusal to consider whether the policy of the Act has been contravened in the instant case.

With respect to such cases it is submitted that Section 3 (d) of the Act establishes in the General Counsel an authority to determine the choice of cases which shall go to the Board for decision; that such authority is a final authority so far as concerns the Board without any right in the Board to review or reverse the issuance of complaints. Such was the evident intent of Congress and such is also the principle, applicable to quasi-judicial agencies such as the Board. A holding that Congress intended

that the Board have authority to review the issuance of complaints or to determine the choice of cases to be presented to it is to render nugatory Section 3 (d) of the Act establishing the final authority of the General Counsel and would also mean a statutory scheme of administration which would be unreasonable in application and resulting in conflicts of authority rather than a division of authority. Such holding would mean that Congress has not achieved its admitted purpose of separating the functions of the Board, but on the contrary, would mean that the Board is still the determinant of what it will prosecute and what it will decide. Clearly, Congress sought to put an end to such administration.

Dated: June 21, 1950.

Gibson, Dunn & Crutcher,
By J. Stuart Neary,
Attorneys for Petitioner.

William F. Spalding,
Of Counsel.

APPENDIX.

[PUBLIC LAW 101—80TH CONGRESS]

[CHAPTER 120—1ST SESSION]

[H. R. 3020]

AN ACT

To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE AND DECLARATION OF POLICY

[29 U. S. C. A., Sec. 141]

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their re-

lations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Title I—Amendment of National Labor Relations Act

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

"FINDINGS AND POLICIES

[29 U. S. C. A., Sec. 151]

"Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not posses full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"DEFINITIONS

[29 U. S. C. A., Sec. 152(6), (7)]

* * * * * * * * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * * * * *

"NATIONAL LABOR RELATIONS BOARD
[29 U. S. C. A., Secs. 153, 154]

"Sec. 3. (a) The National Labor Relations Board (hereinafter called the 'Board') created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

"(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

"(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President

stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

"(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

"Sec. 4. (a) Each member of the Board and the General Counsel of the Board shall receive a salary of $12,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a

legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

* * * * * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

[29 U. S. C. A. Sec. 160]

"SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than

mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall

have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be,

responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

Section 4 of H. R. 3020 as Reported by the House Committee on Education and Labor and as Passed by the House of Representatives, 80th Congress, 1st Session, Establishing the Office of Administrator of the National Labor Relations Act.

"ADMINISTRATOR OF THE NATIONAL LABOR RELATIONS ACT.

"Sec. 4. There is hereby established as an independent agency in the executive branch of the Government an office of Administrator of the National Labor Relations Act (in this Act called the 'Administrator'). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, with reference to his fitness to perform the functions imposed upon him by this Act in a fair and impartial manner, and shall receive compensation at the rate of $12,000 per annum. He shall not engage in any other business, vocation, or employment. The Administrator may establish or utilize such regional, State, local, or other agencies as may from time to time be needed. The Administrator may appoint such officers and employees as he may from time to time find necessary to assist him in the performance of his duties, except that the heads of the regional offices and the chief legal officer in each of such offices shall be appointed by the President, by and with the advice and consent of the Senate. Attorneys appointed under this subsection may, in the discretion of the Administrator, appear for and represent the Administrator in any case in court. In case of a vacancy in the office of the Administrator,

or in case of the absence of the Administrator, the President shall designate the officer or employee of the Administrator who shall serve as Administrator during such vacancy or absence. Expenses of the Administrator, including all necessary traveling and subsistence expenses incurred by the Administrator or employees of the Administrator under his orders while away from his or their official station, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Administrator or by any employee he designates for that purpose. It shall be the duty of the Administrator, as hereinafter provided, to investigate charges of unfair labor practices, to issue complaints if he has reasonable cause to believe such charges are true, to prosecute such complaints before the Board, to make application to the courts for enforcement of orders of the Board, to investigate representation petitions and conduct elections under section 9, and to exercise such other functions as are conferred on him by this Act. The Administrator shall be made a party to all proceedings before the Board under section 10, and shall present such testimony therein and request the Board to take such action with respect thereto as in his opinion will carry out the policies of this Act."

Section 3 of H. R. 3020 in the Form in Which It Passed the Senate, 80th Congress, 1st Session, Providing for the Organization of the National Labor Relations Board and Deleting the Establishment of the Office of the Administrator as Contained in H. R. 3020 as Previously Passed the House.

"NATIONAL LABOR RELATIONS BOARD

"Sec. 3. (a) There is hereby created a board, to be known as the 'National Labor Relations Board' (hereinafter referred to as the 'Board'), which shall be composed of seven members, who shall be appointed by the President, by and with the advice and consent of the Senate. Of the four additional members, whose positions on the Board are established by this amendment, two shall be appointed for terms of five years, and the other two for terms of two years. Their successors, and the successors of the other members, including those presently serving as members shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

"(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not

impair the right of the remaining members to exercise all of the powers of the Board, and four members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

"(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed."

Excerpts From Volume 96 Congressional Record, 81st Congress, 2nd Session, Relating to the Submission by the President to the Congress of Certain Plans for Reorganization of Administrative Agencies, Among Them Plan No. 12 for the Reorganization of the National Labor Relations Board.

general reorganization plans—message from the president of the united states (h. doc. no. 503)

The speaker laid before the House the following message from the President of the United States, which was read, and, together with the accompanying papers, referred to the Committee on Expenditures in the Executive Departments and ordered to be printed:

To the Congress of the United States:

I am today transmitting to the Congress 21 plans for reorganization of agencies of the executive branch. These plans have been prepared under the authority of the Reorganization Act of 1949. Each is accompanied by the message required in that act. (P. 3289.)

* * * * * * * * *

In regard to the regulatory agencies, the plans distinguish between two groups of functions necessary to the conduct of these agencies. One group includes the substantive aspects of regulation—that is, the determination of policies, the formulation and issuance of rules, and the adjudication of cases. All these functions are left in the board or Commission as a whole. The other group of functions comprises the day-to-day direction and internal administration of the complex staff organizations which the Commissions require. These responsibilities are trans-

ferred to the chairmen of the agencies, to be discharged in accordance with policies which the Commissions may establish. The chairman is to be designated in each agency by the President from among the Commission members.

In plan No. 12, unified responsibility is once more established in the National Labor Relations Board by transferring to the Board and its Chairman the functions of the general counsel and by abolishing the statutory office of the general counsel. This plan will bring to an end the confusion which has resulted from divided responsibility. (P. 3290.)

* * * * * * * * *

REORGANIZATION PLANS NOS. 1 TO 13 OF 1950—MESSAGE FROM THE PRESIDENT OF THE UNITED STATES (H. DOC. NO. 504)

The SPEAKER laid before the House the following message from the President of the United States, which was read, and, together with the accompanying papers, referred to the Committee on Expenditures in the Executive Departments and ordered to be printed:

To the Congress of the United States:

I am transmitting today Reorganization Plans Nos. 1 to 13 of 1950, designed to strengthen the management of six executive departments and seven regulatory commissions. These plans propose a major clarification of the lines of responsibility and authority for the management

of the executive branch. They would put into effect the principal remaining recommendations of the Commission on Organization of the Executive Branch of the Government affecting the location of management responsibility within the departments and agencies.

A principal finding of the Commission on Organization was that clean-cut lines of authority do not exist in the executive branch. The Commission stated that "the first and essential step in the search for efficiency and economy in the executive branch of the Federal Government" is to correct the present diffusion of authority and confusion of responsibility. The Commission warned that without this action "all other steps to improve organization and management are doomed to failure."

Reorganization Plans Nos. 1 to 13 propose a bold approach to the problem of delineating responsibility and authority for the management of the executive branch. Clearer lines of responsibility and authority will strengthen our constitutional system and will also help to establish accountability for performance in office—a basic premise of democratic government. I urge the Congress to add its approval to my acceptance of these recommendations of the Commission on Organization. (P. 3291.)

* * * * * * * * *

Reorganization Plan No. 12 terminates the present division and confusion of responsibility in the National Labor Relations Board by abolishing the office of the General Counsel of the Board. The Senate last year in-

dicated its approval of this step. The reorganization plan in effect restores unified authority and responsibility in the Board. As in the case of the other plans for regulatory agencies, certain administrative and executive responsibilities are placed in the Chairman. The relationship between the Board and the Chairman is identical with that provided for the other regulatory agencies. This action eliminates a basic defect in the present organization of the National Labor Relations Board and provides an organizational pattern consistent with that established for the other regulatory agencies. (P. 3292.)

* * * * * * * * *

REORGANIZATION PLAN NO. 12 OF 1950 (NATIONAL LABOR RELATIONS BOARD)—MESSAGE FROM THE PRESIDENT OF THE UNITED STATES (H. DOC. NO. 516)

The SPEAKER laid before the House the following message from the President of the United States, which was read, and, together with the accompanying papers, referred to the Committee on Expenditures in the Executive Departments and ordered to be printed:

To the Congress of the United States:

I transmit herewith Reorganization Plan No. 12 of 1950, prepared in accordance with the Reorganization Act of 1949 and providing for reorganizations in the National Labor Relations Board. My reasons for transmitting this plan are stated in an accompanying general message.

After investigation I have found and hereby declare that each reorganization included in Reorganization Plan No. 12 of 1950 is necessary to accomplish one or more of the purposes set forth in section 2 (a) of the Reorganization Act of 1949.

The taking effect of the reorganizations included in this plan may not in itself result in substantial immediate savings. However, many benefits in improved operations are probable during the next years which will result in a reduction in expenditures as compared with those that would be otherwise necessary. An itemization of these reductions in advance of actual experience under this plan is not practicable.

HARRY S. TRUMAN.

THE WHITE HOUSE, *March 13, 1950.* (P. 3295.)

Reorganization Plan No. 12 of 1950

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949. (H. Doc. No. 516, 81st Congress, 2nd Session.)

National Labor Relations Board

Section 1. *Transfer of functions to the Chairman.*—(a) Subject to the provisions of subsection (b) of this section, there are hereby transferred from the National Labor Relations Board, hereinafter referred to as the Board, and from the General Counsel of the Board, to the Chairman of the Board, hereinafter referred to as the Chairman, the executive and administrative functions of the Board and of the General Counsel, including their functions with respect to (1) the appointment and supervision of personnel, (2) the distribution of business among personnel and among administrative units, and (3) the use and expenditure of funds.

(b) (1) In carrying out any of his functions under the provisions of this section the Chairman shall be governed by general policies of the Board and by such regulatory decisions, findings, and determinations as the Board may by law be authorized to make.

(2) The appointment by the Chairman of the heads of major administrative units under the Board shall be subject to the approval of the Board.

(3) Personnel employed regularly and full time in the immediate offices of members of the Board other than the Chairman shall not be affected by the provisions of this reorganization plan.

(4) There are hereby reserved to the Board its functions with respect to revising Budget estimates and with respect to determining upon the distribution of appropriated funds according to major programs and purposes.

Sec. 2. *Performance of transferred functions.*—The Chairman may from time to time make such provisions as he shall deem appropriate authorizing the performance by any officer, employee, or administrative unit under his jurisdiction of any function transferred to the Chairman by the provisions of this reorganization plan.

Sec. 3. *Transfer of functions to Board.*—All functions of the General Counsel of the Board not transferred by the provisions of section 1 of this reorganization plan are hereby transferred to the Board. The office of such General Counsel (provided for in section 3(d) of the National Labor Relations Act, as amended, 29 U. S. C. 153(d) is hereby abolished.

Excerpts From Senate Majority Report No. 1516, 81st Congress, 2nd Session of Senate Executive Expenditures Committee on Senate Resolution 248, a Resolution to Disapprove the President's Proposed Reorganization Plan No. 12.

Mr. McClellan, from the Committee of Expenditures in the Executive Departments, submitted the following

REPORT

[*To accompany S. Res. 248*]

The Committee on Expenditures in the Executive Departments to whom was referred Senate Resolution 248, expressing disapproval of Reorganization Plan No. 12 of 1950 (Reorganization of the National Labor Relations Board), having considered the same, report favorably thereon, and recommend that the resolution do pass. The effect of the adoption by the Senate of Senate Resolution 248 will be to prevent Reorganization Plan No. 12 of 1950 from becoming effective.

The Committee in executive session on April 17, 1950, took favorable action upon Senate Resolution 248 by a vote of 9 to 4. Members of the committee voting in the affirmative were: Senators McClellan (chairman), Eastland, Hoey, O'Conor, McCarthy, Mundt, Smith of Maine, Schoeppel, and Vandenberg. Members voting against the resolution were: Senators Humphrey, Leahy, Benton and Ives.

Summary of Committee's Findings.

The committee conducted public hearings upon Senate Resolution 248, receiving testimony from nine witnesses in behalf of the approval of the resolution, and three against it. In reporting the resolution of disapproval favorable, the committee agreed substantially with the following points raised by opponents of plan No. 12:

1. The plan repudiates a policy overwhelmingly expressed by Congress as recently as 1947.

2. The plan would destroy public confidence in the impartiality of the administration of laws regulating labor-management relations.

3. The plan would return the National Labor Relations Board to the discredited role of grand jury, prosecutor, and judge.

4. The plan is defective in that it fails to specifically provide where the most important functions of the General Counsel are to be lodged.

5. The plan goes beyond the Hoover Commission's recommendations affecting the Government's regulatory agencies. The Hoover Commission made no specific recommendation concerning the National Labor Relations Board.

6. The plan would not accomplish the objectives of the Reorganization Act of 1949 relating to efficiency and economy.

7. The plan, by concentrating the functions of grand jury, prosecutor, and judge in the Chairman and Board, is contrary to sound principles of Government.

8. The plan provides no satisfactory remedy for the alleged deficiencies in the present law such as questions

relating to jurisdiction, appointment of personnel, and appeals from refusal to issue unfair labor practice complaints.

9. The plan, by giving the Board many additional duties, would further delay its decision of cases.

10. The plan would subject the Board to pressures and influences in case-handling at the initial stage.

11. The plan would bring about extensive litigation pending tests of its legality in the courts.

12. The plan would not effectuate any substantial economy. The President transmitted to the Senate and the House of Representatives in Congress assembled, on March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949 (Public Law 109, 81st Cong.), Reorganization Plan No. 12 of 1950, providing for reorganization of the National Labor Relations Board. (The plan, and the President's message which accompanied it, are included as appendices at the end of this report.)

* * * * * * * * *

(2) *The NLRB under the Taft-Hartley Act*

In 1947 Congress enacted the Taft-Hartley Act (Public Law 101, 80th Cong., 1st sess.). The bill passed by the House of Representatives created an independent office of Administrator of the National Labor Relations Act and gave the Administrator all investigative and prosecuting functions. The Senate bill, while not divorcing the prosecution from the judicial functions of the Board, in a number of ways sought to improve the judicial function of the Board. For example the Board's review section was abolished in order that the decisions of the Board might be those of the Board members rather than those of an

unidentified group of lawyers. Other protections were provided to insure that the report and recommendation of a trial examiner were his alone and not dictated by some unidentified supervisor.

Statutory Background of the General Counsel

The conferees on the bill (H. R. 3020) adopted a new section (sec. 3 (d)), establishing the Office of General Counsel of the National Labor Relations Board. Its provisions are as follows:

Sec. 3. (d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

The intent of Congress with respect to the independence of the General Counsel was made clear by the statement of the House managers accompanying the conference report on H. R. 3020, as follows.[1]

* * * * * * * * *

---

[1]Conference report, Labor-Management Relations Act, 1947 (H. Rept. No. 510, 80th Cong., 1st sess., p. 37).

"The conference agreement does not make provisions for an independent agency to exercise the investigating and prosecuting functions under the act, but does provide that there shall be a General Counsel of the Board, who is to be appointed by the President, by and with the advice and consent of the Senate, for a term of 4 years. The General Counsel is to have general supervision and direction of all attorneys employed by the Board (excluding the trial examiners and the legal assistants to the individual members of the Board), and of all the officers and employees in the Board's regional offices, and is to have the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board. He is to have, in addition, such other duties as the Board may prescribe or as may be provided by law. By this provision responsibility for what takes place in the Board's regional offices is centralized in one individual, who is ultimately responsible to the President and Congress."

Soon after passage of the act, the Board and the General Counsel entered into an agreement whereby certain powers of the Board were delegated to the General Counsel. In general the delegation carried out the intent of Congress as expressed in the legislative history of the Taft-Hartley Act of confining the Board to the function of deciding cases and conferring on the General Counsel

the duties of prosecutor and administrator. For example, the General Counsel was given appointment and removal power over the regional office personnel which he supervised and he was given the function of seeking enforcement of Board orders in the courts after the Board had decided to seek such an order.

The regional offices have continued to operate in a manner similar to that followed under the Wagner Act except that all personnel are now supervised by and responsible to the General Counsel. On unusual questions the regional director is required to seek advice from Washington before issuing complaint. To handle these advice requests, the General Counsel has created a committee composed of the chiefs of several of his departments. This committee briefs the facts and law involved and reports to the General Counsel who determines whether complaint shall issue. When a charging party seeks to appeal from a decision of the regional director refusing to issue complaint the appeal is processed by this same committee for the General Counsel's decision.

Thus, the procedure for handling "requests for advice" and "appeals from refusal to issue complaint" is almost identical with that employed by the Board when it had the prosecuting as well as the judicial function. Proponents of the plan list the fact that there is no appeal from the General Counsel's refusal to issue complaint as a most compelling reason for abolition of the General Counsel and return to the old system. We cannot accept their rea-

soning. There is no appeal to the courts now, nor would there *by* if the plan were adopted. It is argued that there is less chance for arbitrary and capricious action when the decision is made by five men. It may well be answered that one man solely responsible with the spotlight of publicity directly on him, knowing that he may be removed from office, is not going to be arbitrary about refusing to issue complaints. Furthermore, the General Counsel has established his own advisory staff so that decisions are made only after consultation with and upon the advice of competent experts. It seems to us that if there is a possibility of abuse here the remedy might be an appeal to the courts from the General Counsel's denial of the appeal from the regional director's refusal to issue complaint. But that matter is not before us. The Senate must take plan No. 12 without change or turn it down. On that basis, while we agree that there may be some merit in consideration of such appeals by five men rather than one, when it is considered that those five men must later decide the case, we believe that the procedure under present law is far superior on all counts to that provided by the plan.

During his testimony, the Chairman of the NLRB stated that in the event the plan is adopted, the Board might appoint an administrator to pass upon "requests for advice" and create a committee of high staff personnel to analyze "appeals" and present them to the Board as "hypothetical" cases.

We believe it preferable to have decisions made by a man appointed by the President with confirmation by the Senate than by an unidentified Board appointee or committee who would be subservient to the Board. Nor, do we believe it would be possible to keep any important case in a "hypothetical" role.

Some proponents insist that the greater part of the duties of the Board are administrative rather than judicial. We do not believe that those who appear before the Board so regard them, for several important reasons. In both complaint and representation cases a hearing is held before a trial examiner with all parties usually represented by counsel. Briefs are filed with the Board and oral argument is often granted. In representation cases the Board's decision as to appropriate unit and eligibility to vote may well decide whether the union can win the election and bargaining rights. In complaint cases the Board's order often imposes heavy financial responsibilities upon employers for back pay. Its negative orders (cease and desist) when enforced in the courts carry contempt-of-court sanctions when disobeyed.

We believe that the adoption of plan No. 12 and the resultant return to the Board of the dual functions of prosecutor and judge would destroy the public confidence which the Board has gained under the Taft-Hartley Act. We believe this would be true no matter how fair-minded the Board might be in the conduct of its affairs, because the Board performs its functions in an atmosphere charged with emotion, determining issues between parties hotly

contesting their rights and quick to claim bias on the merest suspicion that such exists. The return of the prosecuting function would be an insurmountable handicap to maintenance of the confidence of the litigants and the public.

*   *   *   *   *   *   *   *   *

The Plan Does Not Remedy Deficiencies in Present Act

Conflicting interpretations of the jurisdiction of the Board over small business is given as a major reason for abolition of the independent General Counsel. Witnesses stated that the General Counsel has asserted jurisdiction over many small enterprises thereby subjecting them to litigation only to have the matter dismissed when it finally reached the Board for decision. It is difficult to see how adoption of the plan would contribute much to a solution of this problem. The General Counsel has furnished the committee with a compilation of cases on jurisdiction. They definitely establish that the Board itself has no definite policy with respect to what businesses it holds to be covered by the Act. The decisions have been so inconsistent that no small-business man could possibly determine whether his business is covered. Without attempting to solve a problem which comes under jurisdiction of another committee of the Senate, this committee believes that the solution lies in the establishment by Congress of definite limits to the Board's jurisdiction or in provision for a means of determining jurisdiction at the initial stage.

Excerpts From Minority Senate Report No. 1516, 81st Congress, 2nd Session of Senate Executive Expenditures Committee on Senate Resolution 248, a Resolution to Disapprove the President's Proposed Reorganization Plan No. 12.

In 1947, the Wagner Act was amended drastically by the Taft-Hartley law. Specified unfair labor practices by labor organizations are banned as well as unfair practices by employers. Additional types of employee elections are provided for.

The General Counsel is set up as an independent officer in the National Labor Relations Board with supervision over all attorneys except legal assistants to Board members and *with final unreviewable authority to issue unfair labor practice complaints* on behalf of the Board. The five-man Board set up under the 1947 act has sole control over representation elections but its function with respect to unfair labor practice complaints is limited to issuing decisions on records made after hearing upon complaints issued by the General Counsel. There is no recourse to the Board in respect of charges on which the General Counsel refuses to issue complaints. (Emphasis added.)